



DEPARTMENT OF JUSTICE

Antitrust Division

JOEL I. KLEIN

Assistant Attorney General

*Main Justice Building
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001
(202) 514-2401 / (202) 616-2645 (f)*

*antitrust@justice.usdoj.gov (internet)
<http://www.usdoj.gov> (World Wide Web)*

Joseph C. Bell, Esq.
Mary Anne Mason, Esq.
Hogan & Hartson, LLP
Columbia Square
555 Thirteenth Street, N.W.
Washington, D.C. 20004-1109

Dear Mr. Bell and Ms. Mason:

This is in response to your request on behalf of the Western Systems Coordinating Council ("WSCC") for the issuance of a business review letter pursuant to the Department of Justice's Business Review Procedure, 28 C.F.R. §50.6. You have requested a statement of the Department of Justice's antitrust enforcement intentions with respect to a proposal by WSCC under which it would establish a system of electric power reliability standards, violation of which would subject participating firms to financial sanctions.

WSCC -- one of ten electric reliability councils in North America -- is a voluntary organization responsible for promoting electric system reliability and coordinating operating and planning activities for its 107 member systems. WSCC's members, which represent all segments of the electric industry, provide power in 14 western states, two Canadian provinces, and portions of one Mexican state. WSCC's bylaws provide for membership by state regulatory agencies as well as generators, marketers and transmission companies. WSCC's Board of Trustees is currently composed of representatives of major transmission utilities, transmission dependent utilities, and marketers and independent generators, in equal numbers. Three representatives of state regulatory authorities also serve on the Board of Trustees. In the past the electric power industry was served by a relatively few fully integrated firms whose various activities were heavily regulated. Deregulation has increased the number of firms in the industry and some of these firms are unregulated. As a voluntary organization, WSCC has no authority to compel adherence to reliability standards. It believes that, while a voluntary system adequately protected system reliability under a wholly vertically integrated structure, the industry can no longer rely on a voluntary approach as the old commonality of interests is vitiated by the growth of competition amongst existing providers and new entrants. WSCC concludes that to maintain compliance with reliability criteria, some form of mandatory reliability system is required, including sanctions. Its

proposal would serve that end, until superseded by governmental regulation. WSCC states, however, that no transmission operator would be required to participate in the mandatory reliability program, and there would be no sanctions on those who insist on participating on a voluntary basis.

WSCC identifies 17 reliability criteria which, it states, are critical for reliability management and compliance determinations. It proposes to implement these criteria in three phases. The first phase, establishes reliability criteria dealing with: (1) operating reserves and disturbance control; (2) balancing generation and interchange schedules to load and maintain frequency; (3) maintaining the operating transfer capability of transmission lines; and (4) keeping in operation the automatic voltage regulation and power system stabilizing equipment on generators. The remaining 13 criteria would be added in two phases over a two to three year period. Criteria will be developed in accordance with WSCC's processes for obtaining input from its members and other interested parties.

The reliability criteria would be set forth in a generic tariff (the WSCC Reliability Criteria Agreement) that would be placed on file with the Federal Energy Regulatory Commission ("FERC" or the "Commission"). Interested parties who objected to a reliability criteria would have an opportunity to petition the Commission. Participating members would enter into standardized contracts committing themselves to adhere to the criteria. Each Transmission Operator (defined as WSCC control area operators and transmission facilities operators) would enter into a Reliability Maintenance System ("RMS") Agreement with WSCC that would commit the operator to adhere to the WSCC Reliability Criteria Agreement and to incorporate these criteria into agreements that it reached with inter-connected generators. In turn, each interconnected generator would enter into an agreement with its local Transmission Operator binding both parties to the RMS. This contract would be mandatory for all new interconnections. Transmission Operators would be required to make good faith efforts to reach agreement on amendments to existing interconnection agreements to require compliance with RMS, and to make unilateral filings with the Commission if agreement could not be reached. Although the contracts would incorporate mandatory reliability criteria, implementation of any RMS would depend, in the first instance, on the voluntary execution of a contract between WSCC and a Transmission Operator.

To enforce compliance with the reliability criteria, WSCC proposes to rely on sanctions. There would be four levels of violations: Level 1 - minor or first time incidents of noncompliance; Level 2 - significant or repeat incidents of noncompliance; Level 3 - persistent violations or major incidents of noncompliance; and Level 4 - persistent or flagrant incidents of noncompliance. Notification letters would be the specified sanction for a first or second Level 1 violation or for a first Level 2 violation. Monetary sanctions would be imposed for all subsequent Level 1 or Level 2 violations and for all Level 3 or Level 4 violations. Monetary sanctions would range from: (1) the higher of \$1,000 or 1 mill/kWh to (2) the higher of \$10,000 or 10 mills/kWh.

Compliance would be monitored by the WSCC using data supplied by the Transmission Operators and interconnected generators. If these data indicated potential noncompliance by a

party, WSCC would provide an opportunity for the party to submit additional or corrected data. Thereafter, where appropriate WSCC would identify instances of noncompliance and initiate sanctions.

Participants who receive an initial determination of noncompliance could appeal to a WSCC Reliability Compliance Committee composed of one representative from each of the following seven industry sectors: major transmitting utilities; transmission dependent utilities; independent power producers; power marketers; state, provincial (Canadian), or local regulatory bodies; municipal utility systems; and control area or independent system operators. If a party disputed the determination of the Reliability Compliance Committee, it could pursue Alternative Dispute Resolution under criteria on file with the Commission. The dispute resolution provisions are modeled largely on the dispute resolution provisions previously accepted by FERC in another proceeding. These provisions permit appeals to the Commission (or the courts in the case of nonjurisdictional parties).

Monies collected as penalties would be used to defray the expense of the RMS program (estimated to be between \$0.5 and \$1 million a year). If penalties recovered exceed the operating costs, the surplus would be passed on to all WSCC members participating in the RMS (including generators and non-control area transmission operators).

WSCC filed a petition with the Federal Energy Regulatory Commission seeking a regulatory determination that its Reliability Management System was fair and reasonable and an indication that the Commission would play the review role envisioned for it in the WSCC proposal. In response the Commission asserted jurisdiction over the WSCC proposal and approved its implementation on an experimental basis, finding that WSCC's governance procedures seemed to be "fair" and its ADR procedures for dealing with proposed violations and sanctions seemed to be "just and reasonable."

Based on the information and assurances provided to us by WSCC, the Department of Justice has no current intention to institute antitrust enforcement action against the process by which WSCC proposes to establish reliability standards and to impose sanctions for violations thereof. (We have not considered, and therefore this letter does not address, the specific reliability criteria that have been or are likely to be developed by WSCC.) You have assured us that the processes under which the reliability standards are to be established and enforced are open to all interested parties, provide for representation for all segments of the industry, are not designed to competitively disadvantage any particular party or segment of the industry, and that Commission or court review will be available to review disputes. To the extent that these assurances are fulfilled, the processes at issue do not, on their face, appear to raise significant risks to competition. To be sure, any standard setting or sanctions process is susceptible to anticompetitive manipulation or abuse, and the Department reserves its right to take appropriate enforcement should such events occur.

For these reasons, the Department is not presently inclined to initiate antitrust enforcement action against WSCC's proposal. This letter, however, expresses the Department's current

enforcement intention. In accordance with our normal practices, the Department reserves the right to bring any enforcement action in the future if the actual operation of the proposed reliability standards program proves to be anticompetitive in any purpose or effect.

This statement is made in accordance with the Department's Business Review Procedure, 28 C.F.R. §50.6. Pursuant to its terms, your business review request and this letter will be made publicly available within 30 days of the date of this letter, unless you request that part of the material be withheld in accordance with Paragraph 10(c) of the Business Review Procedure.

Sincerely,

Joel I. Klein
Assistant Attorney General